



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

March 14, 2006

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Ernie Fischer
P.O. Box 173
Selfridge, ND 58568

Re: In the Matter of Ernie Fischer
Complaint for Penalty, Compliance Order, and
Notice of Opportunity for Hearing pursuant to
sections 113(a)(3) and (d) of the Clean Air Act

Dear Mr. Fischer:

The U.S. Environmental Protection Agency ("EPA") is issuing you the enclosed Complaint for Penalty, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") for alleged violations of the Clean Air Act and the federal regulations regarding the asbestos National Emission Standards for Hazardous Air Pollutants ("NESHAP") set forth at 40 CFR part 61, subpart M, associated with the demolition of the former Selfridge Cheese Plant facility ("facility") in Selfridge, North Dakota. The Complaint is issued pursuant to sections 113(a)(3) and (d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(a)(3) and (d).

EPA alleges in the Complaint that you failed to comply with the CAA and federal NESHAP regulations when you demolished the facility on or about the week of June 6, 2005. Specifically, EPA alleges that you failed to notify EPA of your intent to demolish (40 CFR § 61.145(b)(1)); failed to remove all regulated asbestos-containing material prior to commencing demolition activities (40 CFR § 61.145(c)(1)); failed to not discharge visible emissions to the outside air (40 CFR § 61.150(a)); failed to properly dispose of asbestos-containing waste (40 CFR § 61.150(b)(1); and failed to respond to a Request for Information issued by EPA pursuant to section 114 of the CAA, 42 U.S.C. § 7414. EPA proposes a total penalty of \$76,400 based on the alleged violations. A compliance order also is set forth in the Complaint to address the on-going threat to the environment and public health caused by the demolition activities.

With regard to the Complaint and alleged CAA violations, you have the right to a hearing to contest the factual allegations and/or proposed penalty. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an answer set forth in 40 C.F.R. §§ 22.15



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and 22.38. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file a written answer and one copy within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

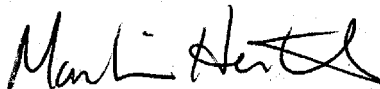
If you do not file an answer by the deadline, you may be found in default. A default judgment may impose the full penalty proposed in the Complaint.

Whether or not you request a hearing, we encourage you to confer informally with EPA concerning the alleged violations to negotiate a settlement in lieu of proceeding with a formal hearing. You may wish to appear at an informal conference yourself and/or be represented by your counsel. To arrange for such a conference, please contact Brenda Morris, Enforcement Attorney, Legal Enforcement Program, at the number provided below. While an informal conference procedure may be pursued as an alternative to, or simultaneous with, a hearing, request for such a conference does not extend the thirty (30) day period during which a request for hearing must be submitted.

If you have any questions, the most knowledgeable persons on my staff regarding this matter are Ms. Morris and Brenda South. Ms. Morris can be reached at (303) 312-6891. Ms. South, in our Lead/Asbestos Enforcement Program, can be reached at (303) 312-7076.

We urge your prompt attention to this matter.

Sincerely,



Martin C. Hestmark, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

enc: Consolidated Rule of Civil Practice, 40 CFR part 22
Complaint for Penalty, Compliance Order, and Notice of Opportunity for Hearing
Clean Air Act Stationary Source Penalty Policy

cc: William C. Severin, Esq.
Chairman Ron His Horse is Thunder, Standing Rock Sioux Tribe
Bob Buffalo Boy, Standing Rock Sioux Tribe

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2006 MAR 14 PM 1:45

IN THE MATTER OF:)	Docket No. CAA-08-2006-0002
)	
Mr. Ernie Fischer)	COMPLAINT FOR PENALTY,
Selfridge, North Dakota)	COMPLIANCE ORDER, AND
)	NOTICE OF OPPORTUNITY
Respondent.)	FOR HEARING
)	
Proceeding under Sections 113(a)(3) and (d) of the)	
Clean Air Act, 42 U.S.C. §§ 7413(a)(3) and (d))	

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in sections 113(a)(3) and (d) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(a)(3) and (d). The federal regulations regarding the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) are set out in part 61, subpart M, of title 40 of the Code of Federal Regulations (40 CFR). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Rules of Practice"), 40 CFR part 22, a copy of which is enclosed.
2. The undersigned Environmental Protection Agency, Region 8 ("EPA"), officials have been properly delegated the authority to issue this Complaint for Penalty, Compliance Order and Notice of Opportunity for Hearing ("Complaint").
3. EPA proposes the assessment of a civil penalty and compliance measures based on Respondent Ernie Fischer's ("Respondent") alleged violation of the CAA and the NESHAP regulations, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge ("ALJ") to disagree with any factual allegation made by EPA in the Complaint, or the appropriateness of the proposed penalty, or to present the grounds for any legal defense it may have.
5. To disagree with the Complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Region 8 Hearing Clerk at the following address:

Region 8 Hearing Clerk
U.S. EPA Region 8 (8RC)
999 18th Street, Suite 300
Denver, CO 80202

within 30 calendar days of receiving this Complaint and provide a copy to the enforcement attorney listed below. The answer must clearly admit, deny or explain the factual allegations of the Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE CAA.**

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty and performing the compliance tasks set forth in the Complaint. Such action to comply and make payment need not contain any response to, or admission of, the allegations in the Complaint. Such action to comply and make payment constitutes a waiver of Respondent's right to contest the allegations and appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

7. EPA encourages settlement discussions through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Brenda Morris, Enforcement Attorney, at [1-800-227-8917; extension 6891 or 303-312-6891] or at the address identified in paragraph 52 herein. **Please note that contacting the attorney or requesting a settlement conference does NOT delay the running of the 30-day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to all times relevant to this action, and to each count of this Complaint:

8. The asbestos NESHAP regulations apply to, among other things, the demolition and renovation of buildings.
9. The Turtle Mountain Band of Chippewas Indian Tribe ("Tribe") owns the former Selfridge Cheese Plant facility ("facility") located in Selfridge, North Dakota.
10. The building is a "facility" within the meaning of 40 CFR § 61.141.

11. Respondent Ernie Fischer is an individual living in the State of North Dakota, within the exterior boundaries of the Turtle Mountain Indian Reservation.
12. Respondent is a "person" as defined by section 302(e) of the CAA, 42 U.S.C. § 7602(e).
13. Respondent is an "operator" within the meaning of 40 CFR § 61.141.
14. During the week of June 6, 2005, the Respondent demolished the facility, including the roof and exterior walls, using heavy machinery in the form of a bobcat.
15. Respondent "demolished" the facility within the meaning of 40 CFR § 61.141.
16. Badlands Environmental Consultants ("Badlands"), on behalf of the Tribe, took 15 samples of the debris from the facility demolition on July 22, 2005, and submitted the samples to Crisp Analytical Labs at Houston, LLC, and Schneider Laboratories, Inc., for asbestos and lead analyses, respectively.
17. 40 CFR § 61.141 defines "asbestos" to mean the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.
18. According to the analytical results for the debris from the building demolition, two types of building debris tested positive for asbestos. The sample of black roof material tested at 3 % chrysotile, and the light green and grey transite tested at 30 % chrysotile.
19. 40 CFR § 61.141 defines "friable asbestos material" as any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, . . . that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.
20. 40 CFR § 61.141 defines "nonfriable asbestos-containing material" as any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, . . . that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.
21. 40 CFR § 61.141 defines "category I nonfriable asbestos-containing material (ACM)" to mean asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy.
22. 40 CFR § 61.141 defines "category II nonfriable ACM" to mean any material, excluding category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized

Light Microscopy that when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

23. 40 CFR § 61.141 defines "regulated asbestos-containing material" ("RACM") as a) friable asbestos material, b) category I nonfriable asbestos-containing material that has become friable, c) category I nonfriable asbestos-containing material that will or has been subject to sanding, grinding, cutting or abrading, or d) category II nonfriable asbestos-containing material that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.
24. 40 CFR § 61.141 defines "asbestos-containing waste materials" to mean mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this subpart including filters from control devices, friable asbestos waste material and bags or similar packaging contaminated with commercial asbestos. As applies to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.
25. EPA document #340/1-92-013, entitled "A Guide to Normal Demolition Practices Under the Asbestos NESHAP", dated September 1992, states on page 1-1 that "nonfriable asbestos-cement products such as transite are an example of Category II material."
26. "A Guide to Normal Demolition Practices Under the Asbestos NESHAP" states on page 4-1 that "use of heavy machinery during the razing process causes Category II nonfriable ACM, but not Category I nonfriable ACM to become RACM."
27. Badlands, at the Tribe's request, completed an asbestos assessment at the facility, including quantification of transite cement board previously identified as asbestos-containing, wherein it concluded that approximately 1000 square feet of asbestos transite cement board debris was scattered throughout the facility. Badlands noted that some transite remained attached to building components.
28. Section 114 of the CAA, 42 U.S.C. § 7414, authorizes the Administrator to require any person who is subject to any requirement to provide such information as the Administrator may reasonably require for the purpose of determining whether a person is in violation of any requirement.
29. Pursuant to section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Administrator may, in part, issue a administrative order against any person assessing a civil administrative penalty of up to \$32,500 per day of violation, when on the basis of available information, the Administrator finds such person in violation of any requirement or prohibition of this

subchapter or subchapter III, IV-A, V, or VI of this chapter, including a requirement or prohibition of any rule promulgated under this chapter.

30. Section 113(a)(3)(B) of the CAA, 42 U.S.C. § 7413(a)(3)(B), provides, in part, that the Administrator may issue an order requiring a person to comply with a requirement or prohibition upon finding that such person has violated, or is in violation of, any requirement or prohibition of this subchapter, section 7603, or subchapter IV-A, V, or VI of this chapter, including a requirement or prohibition of any rule promulgated under those provisions or subchapters.

COUNT 1

Failure to notify EPA of intent to demolish

31. 40 CFR § 61.145(b)(1) requires each owner or operator of a demolition or renovation activity to, among other things, provide EPA with written notice of intent to demolish or renovate.
32. Respondent failed to provide EPA written notice of intent to demolish the facility.
33. Respondent's failure to provide EPA written notice of intent to demolish the facility is a violation of 40 CFR § 61.145(b)(1) and CAA § 113, 42 U.S.C. § 7413.

COUNT 2

Failure to remove RACM

34. 40 C.F.R. § 61.145(c)(1) requires the owner or operator of a demolition or renovation activity, among other things, to remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.
35. Following the Respondent's demolition activities, asbestos-containing waste material was scattered throughout the demolition debris, and some RACM was still attached to building components
36. Respondent failed to remove all RACM from the facility before demolishing the building with heavy machinery.
37. Respondent's failure to remove all RACM from the facility before beginning any activity that would break up, dislodge, or similarly disturb the material constitutes a violation of 40 CFR § 61.145(c)(1) and CAA § 113, 42 U.S.C. § 7413.

COUNT 3

Failure to not discharge visible emissions to the outside air

38. 40 CFR § 61.150(a), requires that the owner or operator of a demolition or renovation activity discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source.
39. Respondent transported approximately four truck loads of demolition debris from the facility to a private road located off-site.
40. Respondent discharged visible emissions to the outside air by allowing asbestos-containing waste material in the demolition debris to be exposed to the outside air.
41. Respondent's failure to not discharge any visible emissions to the outside air during the collection, processing (including incineration), packaging or transporting of any asbestos-containing waste material generated by the source constitutes a violation of 40 C.F.R. § 61.150(a), CAA § 113, 42 U.S.C. § 7413.

COUNT 4

Failure to properly dispose of asbestos-containing waste

42. 40 CFR § 61.150 (b)(1) requires the owner or operator of a demolition or renovation activity, among other things, to deposit all asbestos-containing waste materials as soon as is practical at a waste disposal site operated in accordance with the asbestos NESHAP.
43. Respondent discarded approximately four truck loads of demolition debris from the facility on a private road to assist with erosion control at the point where the road intersects Porcupine Creek. Respondent left the remaining demolition debris, including asbestos-containing waste material, on site.
44. Respondent's failure to deposit all asbestos-containing waste materials as soon as practical at a waste disposal site operated in accordance with the asbestos NESHAP constitutes a violation of 40 C.F.R. § 61.150(b)(1).

COUNT 5

Failure to respond to information request

45. EPA issued Respondent a Request for Information pertaining to the facility demolition pursuant to section 114 of the CAA, 42 U.S.C. § 7414, on September 29, 2005.

46. The Request for Information required that Respondent respond within thirty (30) days of receipt, accompanied by a notarized certificate signed by the person preparing the response
47. According to the return receipt signed by Respondent, Respondent received the Request for Information on October 19, 2005.
48. Respondent's response to the Information Request was due to EPA on or before November 18, 2005.
49. Respondent failed to respond to the Request for Information or otherwise contact EPA by November 18, 2005.
50. Respondent's failure to respond to EPA's Request for Information constitutes a violation of CAA § 114, 42 U.S.C. § 7414.

PROPOSED CIVIL PENALTY

51. The proposed civil penalty has been determined in accordance with section 113(d) of the CAA, 42 U.S.C. § 7413(d). Section 113(d)(1) of the CAA, 42 U.S.C. 7413(d)(1), and 40 C.F.R. part 19 authorize EPA to assess a civil penalty of up to \$32,500 per day for each violation of the asbestos NESHAP regulations occurring after March 15, 2004. In determining the amount of any civil penalty assessed, EPA is required to take into account, in addition to such other factors as justice may require, the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. 42 U.S.C. § 7413(e). Based upon an evaluation of the facts alleged in this Complaint and the statutory factors set forth in CAA § 113(e), 42 U.S.C. § 7413(e), EPA proposes a civil penalty of **\$76,400** based on the violations alleged above.
52. Complainant evaluated facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Penalty Policy dated October 25, 1991 (penalty policy) and Appendix III of the penalty policy, Asbestos Demolition and Renovation Civil Penalty Policy, revised May 5, 1992. Enclosed with this Complaint is a copy of Appendix III of the penalty policy.

COMPLIANCE ORDER

53. Respondent must comply with 40 CFR § 61.150(a) which requires that the owner or operator of a demolition or renovation activity discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or

transporting of any asbestos-containing waste material generated by the source, and 40 CFR § 61.150 (b)(1) which requires the owner or operator of a demolition or renovation activity, among other things, to deposit all asbestos-containing waste materials as soon as is practical at a waste disposal site operated in accordance with the asbestos NESHAP. In order to comply with above requirements, Respondent must ensure that a certified asbestos contractor: 1) removes all asbestos-containing waste material in the building debris, 2) carefully bags all asbestos-containing waste material from the building debris, 3) properly transports (using a marked vehicle) all asbestos-containing waste material to an approved asbestos landfill, and 4) maintains asbestos waste shipment records documenting the transport of the asbestos-containing waste material to the landfill.

54. Respondent must provide evidence of compliance with the above requirements to the following EPA representative by May 30, 2006:

Brenda South (8ENF-AT)
U.S. EPA - Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466
Telephone: (303) 312-7076
Facsimile: (303) 312-6191
Email: south.brenda@epa.gov

55. Respondent's payment of the penalty shall be made by money order or certified check made payable to "Treasurer, United States of America" and mailed to the following address:

EPA - Region 8
Regional Hearing Clerk
P.O. Box 360859
Pittsburgh, Pennsylvania 15251

A copy of said check shall be mailed to the following address:

Brenda Morris (8ENF-L)
Enforcement Attorney
U.S. EPA - Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

56. The provisions of this Complaint shall apply to and be binding upon Respondent, its officers, directors, agents, servants, employees, and successors or assigns.

57. Pursuant to section 113(a)(4) of the CAA, 42 U.S.C. § 7413(a)(4), no order issued under CAA section 113 shall take effect until the person to whom it is issued has had an opportunity to confer with EPA concerning the alleged violation(s).
58. Section 113(d) of the CAA, 42 U.S.C. § 7413(d) provides that an administrative penalty assessed under the subsection shall be assessed by the Administrator by an order made after opportunity for a hearing and following written notice by the Administrator to the person to be assessed an administrative penalty of the proposal to issue such order and an opportunity to request a hearing on the order within thirty (30) days of receipt of notice.
59. This Complaint does not constitute a waiver, suspension, or modification of the requirements of any applicable provision of the CAA or the asbestos NESHAP regulations which remain in full force and effect. Issuance of this Complaint is not an election by the EPA to forego any civil or any criminal action otherwise authorized under the CAA.

Issued this 14th day of March, 2006

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 8
Complainant

Michael T. Risner

Michael T. Risner, Director
David J. Janik, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

Martin C. Hestmark

Martin C. Hestmark, Director
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 14th, 2006, the original and one copy of the COMPLAINT FOR PENALTY, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING, with Exhibits 1 and 2, were hand-carried to the Regional Hearing Clerk, EPA, Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail to:

Ernie Fischer
P.O. Box 173
Selfridge, ND 58568

Date 3/14/06

Judith M. McTernan
Signature

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the

development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,
Administrator.

Therefore, 40 CFR part 22 is revised to read as follows:

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
- 22.8 Ex parte discussion of proceeding.
- 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

- 22.29 Appeal from or review of interlocutory orders or rulings.
- 22.30 Appeal from or review of initial decision.

1st Page only

CLEAN AIR ACT
STATIONARY SOURCE
CIVIL PENALTY POLICY

October 25, 1991

APPENDIX III

ASBESTOS DEMOLITION AND RENOVATION CIVIL PENALTY POLICY
Revised: May 5, 1992

The Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions under Section 113 (b) of the Clean Air Act ("the Act"). In addition, the General Penalty Policy is used by the Agency in determining an appropriate penalty in administrative penalty actions brought under Section 113 (d) (1) of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, this Appendix provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the General Penalty Policy.

This Appendix is to be used for settlement purposes in civil judicial cases involving asbestos NESHAP demolition and renovation violations, but the Agency retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the Appendix is to be used in conjunction with the General Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a minimum civil penalty settlement amount in the referral. For administrative penalty cases under Section 113 (d) (1), the Region will plead the calculated penalty in its complaint. In both instances, consistent with the General Penalty Policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance,¹ ability to pay, and litigation risk.

The "gravity" component should account for statutory criteria such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory

¹ As discussed in the General Penalty Policy, history of noncompliance takes into account prior violations of all environmental statutes. In addition, the litigation team should consider the extent to which the gravity component has already been increased for prior violations by application of this Appendix.